84-126

Office-Supreme Court, U.S.
FILED
JUN 25 1984
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

VICTOR PERELLA,
Appellant

v.

STATE OF NEW JERSEY,
Appellee

On Appeal from the Supreme Court Of New Jersey

JURISDICTIONAL STATEMENT - STATE CRIMINAL CASE

Judd J. Carhart, Esquire
Attorney for Appellant, Victor Perella
One Milk Street
Boston, Massachusetts 02109
(617) 423-0630

Attorney General of New Jersey
Attorney for Appellee,
State of New Jersey
25 Market Street, CN 086
Trenton, New Jersey 08625
(609) 292-4919

54pp.

QUESTIONS PRESENTED

Did the Supreme Court of New Jersey err in affirming the decision of the Superior Court of New Jersey - Appellate Division, holding N.J.S.A. 2C:39-5(b) constitutional by finding that a person passing through the State of New Jersey is required to obtain a permit to carry a handgun from the State of New Jersey or be found guilty of a crime of the third degree, although such person is licensed to carry a firearm in another state?

Did the Supreme Court of New Jersey err in holding that the untaxed cigarettes which gave rise to the arrest of defendant were within the plain view exception for a warrantless search and were not illegally seized?

Did the Supreme Court err in holding that the warrantless search of the "trunk"

of the defendant's vehicle was proper and did not violate defendant's Fourth Amendmend right to be free from unreasonable searches and seizures?*

*The parties to the proceeding in the Supreme Court of New Jersey were Victor Perella, Appellant herein, and the Attorney General for the State of New Jersey, Appellee herein.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

VICTOR PERELLA,

Appellant

v.

STATE OF NEW JERSEY,

Appellee

JURISDICATIONAL STATEMENT - STATE CRIMINAL CASE

CITATIONS TO OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Law Division, Burlington County, is not officially reported and is annexed as A2. The order of the Appellate Division is not reported and is annexed as A7-A12. The affirmance by the Supreme Court of New Jersey was without an opinion and is annexed as A13.

JURISDICTION

In affirming appellant's conviction, the Supreme Court of New Jersey upheld the constitutionality of N.J.S.A. 2C:39-5(b), which requires an individual, either resident or non-resident, to have obtained a New Jersey permit for any weapon carried in the state. The judgment of the Supreme

Court was entered on March 27, 1984. The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1257(2).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV
Searches and Seizures

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV, §1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

N.J.S.A. 2C: 39-5(b) Handguns. Any person who knowingly has in his possession any handgun, including any antique handgun without first having obtained a permit to carry the same as provided in section 2C: 58-4, is guilty of a crime of the third degree.

STATEMENT OF THE CASE

On January 28, 1982, Trooper Samulis of the New Jersey State Police, who was patrolling the New Jersey Turnpike, stopped the vehicle of Victor Perella for an alleged motor vehicle violation. Mr. Perella was a passenger at the time. While standing outside the vehicle, Trooper Samulis made some observations concerning cartons of cigarettes. He asked Robert Bronzetti, the driver of the vehicle, if he had any cigarettes. Mr. Bronzetti responded affirmatively. There was a paper bag in the rear of the vehicle. Trooper Samulis reached into the car and seized the bag, removing it from the vehicle. He then opened the bag and saw the untaxed cigarettes. Trooper Samulis then requested to search the vehicle, but

Mr. Perella refused to grant the request. Mr. Perella and Mr. Bronzetti were then arrested and Trooper Samulis entered Mr. Perella's vehicle and searched the passenger compartment. After this search, Trooper Samulis opened the hatchback of the vehicle and discovered the locked briefcase underneath the seat. Mr. Perella refused to open the briefcase; a search warrant was later obtained from Judge Wood. The briefcase contained a nine millimeter pistol, a plastic bag containing suspected marijuana, and a vial and plastic funnel with white powder residue.

The defendant was charged in Mount Laurel Township Complaint WI 24528 with violation of N.J.S.A. 24: 20-20(a)(1) (possession of CDS, cocaine), and N.J.S.A. 2C:39-5(b) (unlawful possession of a nine

millimeter automatic pistol). The defendant was held in the Burlington County Jail and subsequently obtained his release upon bail.

On April 2, 1982, the grand jury returned indictment I-246-82, charging the defendant in two counts, with unlawful possession of a handgun in violation of N.J.S.A. 2C:39-5(b), and unlawful possession of a controlled dangerous substance, cocaine, in violation of N.J.S.A. 24:21-20(a)(1).

On June 3, 1982, the defendant filed a Notice of Motion to Suppress all evidence seized from his vehicle, which he anticipated would be offered against him. On August 16, 1982, a hearing was held before the Honorable Myron H. Gottlieb, J.S.C. It was found by Judge Gottlieb as a fact that the cavity created when the

back seat of the vehicle was pushed forward amounted as a matter of law to a "trunk". Judge Gottlieb also found as a fact that the folded deck contained numerous pieces of luggage and a large painting. However, the motion to suppress was denied on August 26, 1982, and the order denying such motion was submitted by the office of the Burlington County Prosecutor (A1-A2).

On October 14, 1982, the defendant filed a Notice of Motion for an Order dismissing the weapons count of the indictment, pursuant to N.J.S.A. 2C:2-11 (De Minimus Infractions). On December 17, 1982, a hearing was conducted before the Honorable Martin L. Haines, A.J.S.C., and defendant's motion was denied.

On December 17, 1982, the defendant retracted his plea to the first count of

the indictment, charging unlawful possession of a handgun, before the Honorable Paul R. Kramer J.S.C.

On January 21, 1983, the defendant was sentenced by the Honorable Paul R. Kramer, and on Count One of the indictment received a find of $100.00 plus a $25.00 penalty assessed under the Violent Crimes Compensation Board Act. At that time, Count Two of the indictment and Mount Laurel Township Complaint S354336 were dismissed. A Judgment of Conviction was entered the same day (A3-A6).

On March 4, 1983, defendant filed a Notice of Appeal with the Superior Court of New Jersey - Appellate Division. On March 14, 1983, notice was received that the appeal had been docketed on March 7, 1983, and assigned a docket number of

A-3016-8254. On April 21, 1983, defendant filed an Amended Notice of Appeal.

Defendant, in his appeal, contended that the Court had erred in not dismissing Count One of the indictment in accordance with N.J.S.A. 2C:2-11 (De Minimus Infractions). He also contended that the warrantless search of the "trunk" of his vehicle was violative of the search doctrine announced in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860 (July 1, 1981). Defendant further contended that the untaxed cigarettes which gave rise to his arrest were illegally seized and did not fall within the "plain-view" exception for a warrantless search.

The case was submitted to the Superior Court of New Jersey, Appellate Division, on January 19, 1984, and was decided on February 7, 1984 before Judges

J. H. Coleman and Bachman, J.S.C., (A7-A12).

The court in its decision per curiam, held that probable cause existed to arrest the defendant for possession of untaxed cigarettes, based upon Mr. Bronzetti's admission and Trooper Samulis' observations. The court further held that the search of the interior of the vehicle, and also of the luggage, for untaxed cigarettes, was authorized under New York v. Belton, 453 U.S. 454 (1981). It was stated that the automobile exception excused the warrant requirement, and the court affirmed the order denying the motion to suppress.

The Court further held that, "A review of the legislative history and intent which underlie the passage of N.J.S.A. 2C:39-5(b) makes it clear that no

distinction was intended for persons licensed to carry guns in other states." Although defendant was licensed to carry a firearm in the State of Massachusetts, the Appellate Division of the Superior Court of New Jersey upheld the constitutionality of N.J.S.A. 2C:39-5(b), and found defendant's contentions were without merit.

On February 17, 1984, a Notice of Petition for Certification was filed with Mrs. Elizabeth McLaughlin, the Clerk of the Superior Court of New Jersey - Appellate Division. On March 27, 1984, the Honorable Robert L. Clifford denied the Petition for Certification, without an opinion (A13).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

The case presents the important question of whether a state may, by statute, require that a person obtain a permit in that state to carry a handgun, although such person is merely passing through the state and such person has a license to carry a firearm in another state.

The appellant, Mr. Perella, was licensed to carry a firearm in the State of Massachusetts as indicated by the attached license to carry firearms issued by the Commonwealth of Massachusetts to the appellant (A17). The Massachusetts license also authorized the appellant to carry the weapon in his occupation as a private investigator.

The weapon that Mr. Perella was "carrying" was located in a locked briefcase under the rear deck of the vehicle which was covered with various items of luggage. In order to get the weapon from the vehicle, Mr. Perella would have had to unpack the rear of the car, raise the rear seat, and then unlock the briefcase which contained the weapon. There is no indication that Mr. Perella ever intended to handle the gun, to fire the weapon, or to use it in any manner in the State of New Jersey.

It is understood that New Jersey has a great interest in protecting its citizens by controlling the possession of handguns within its borders. However, to allow the statute to be so overly broad that a felony conviction will result from the factual situation presented here is a

violation of due process under the Fourteenth Amendment, and therefore unconstitutional. The requirement that Mr. Perella, although complying with Massachusetts law for possession of a handgun, have to stop at the border of every state and ascertain and comply with that state's gun laws before being allowed to pass through it would be an unreasonable restraint on interstate travel.

N.J.S.A. 2C:39-5(b) simply requires an individual, either resident or non-resident, to have obtained a New Jersey permit for any weapon carried in this state. There are no concessions made for persons who possess such permits from other states. The statute allows a defendant to be convicted of a felony without taking into consideration the

facts surrounding the possession of the handgun, such as the location of the weapon, the extent to which the defendant "possessed" the weapon, the period of time which the defendant was within the state, and the possession of a permit from another state. Because of the lack of a balancing test between appellant's conduct and the severity of the consequences attached to a violation of the statute, the question of the validity of the statute involves constitutional issues and should be granted review.

II.

The affirmance by the Supreme Court of New Jersey of the Appellate Division's holding that the untaxed cigarettes which gave rise to the arrest of the appellant

were within the plain view exception for a warrantless search and were not illegally seized presents a substantial constitutional question meriting review.

The plain view doctrine is a recognized exception to the rule requiring an officer to first obtain a search warrant before any evidence may be seized. Under this doctrine, an officer who sees evidence in plain view may seize that evidence without a warrant. In Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971), this Court set up the elements necessary for the application of the plain view rule. The rule applies if: (1) The initial intrusion resulting in the "plain view" was lawful, State v. Ercolano, 79 N.J. 25 (1978), (2) the discovery of the object was inadvertent, and (3) the incriminating nature of the

object was "immediately apparent". Id. at 464-73. Accord U.S. v. Sanders, 631 F.2d 1309 (1980), Anderson v. State, 555 P.2d 251 (Alaska Sup. Ct. 1976). In the case at bar, Trooper Samulis failed to meet all three of these requirements before seizing the untaxed cigarettes. If the appellant's vehicle had been weaving, the initial intrustion may have been lawful. However, after the initial stop, Trooper Samulis observed the cigarettes in a brown paper bag; their incriminating nature, that they were untaxed, was not immediately apparent. It was only after Trooper Samulis had removed the bag from the vehicle and taken the cigarettes out that he became aware of the fact that the cigarettes were untaxed. On direct examination, Trooper Samulis indicated:

Q. Were you able to observe whether they were taxed or untaxed cigarettes?

A. Not the ones that were in the carton or the back seat, not at this time, no.

Q. Were you able to observe that with regard to the pack that Mr. Bronzetti had?

A. Yes. Eventually I did check that pack and eventually I did check the bag in the back. (T7-11 to 18)

On cross-examination, Trooper Samulis testified:

Q. You couldn't tell from standing outside the car whether or not that particular pack bore a New Jersey tax stamp or not, correct?

A. No, not as I stood outside the vehicle, no.

Q. It was at that point that you requested that Mr. Bronzetti and Mr. Perella exit the vehicle, correct?

A. Yes.

Q. It was at that point that you then retrieved from the vehicle the packet of cigarettes and the brown paper bag, correct?

A. No. I just -- I checked the single pack which was open and I retrieved the brown paper bag with the cartons. (T20-10 to 23).

Trooper Samulis further testified on cross-examination:

A. Yes. I retrieved the cigarettes. The carton not the one that was

checked and left right where it was.

Q. That was that you actually physically got in the car to look at it?

A. I leaned in, yes. It was a very small car. I just leaned in, checked that and then retrieved the brown paper bag which was located in back. (T21-2 to 9)

Trooper Samulis further testified:

Q. From your position outside the vehicle you obviously couldn't see the bottom of that pack, could you?

A. No. I just stated I could not see which tax stamp it was from the outside of the vehicle. (T21-22 to T22-1)

It is obvious from this testimony that Trooper Samulis failed to satisfy the third requirement of the test set up by the Court in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971). The incriminating nature of the object was not immediately apparent. It was only after he "leaned" into the vehicle and "checked" the pack that its untaxed character became apparent. Even though Trooper Samulis saw the pack of cigarettes, he was not authorized to enter appellant's vehicle.

In United States v. Jackson, 576 F.2d 749 (1978), the United States Court of Appeals for the Eighth Circuit held that a search and seizure of items in an attache case and in a file cabinet were not authorized by the plain view doctrine. "Plain view seizure is limited to items that are clearly incriminating and

inadvertently encountered in the course of a justifiable intrusion." Id. at 753. Although the file drawer and the briefcase that the agents seized were in plain view, the contents of each were not. In the present case, the cigarettes seized by the officer were in plain view; however, their untaxed nature was not. Therefore, Trooper Samulis' seizure of the cigarettes did not fall within the plain view exception, and such evidence should have been excluded.

III.

The affirmance by the Supreme Court of New Jersey of the Appellate Division's finding that the warrantless search of the "trunk" of appellant's vehicle was proper and did not violate appellant's Fourth

Amendment right to be free from unreasonable searches and seizures warrants review by this Court because of the constitutional issues raised in this decision.

The search in this case occurred prior to this Court's decision in United States v. Ross, 102 S.Ct. 2157 (June 1, 1982). In Ross, this Court held that police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband was concealed somewhere within it could conduct a warrantless search of the vehicle as thorough as a magistrate could authorize by warrant, since the scope of the warrantless search of an automobile is not defined by the nature of the container in which the contraband is secreted, but rather, is defined by the object of the

search and places to which there is probable cause to believe it may be found. Id. at 2172. This decision overruled Robbins v. California, 453 U.S. 420, 101 S.Ct. 2841 (1981), and modified Arkansas v. Sanders, 44 U.S. 753, 99 S.Ct. 2586 (1979).

Although the New Jersey Supreme Court has indicated that Ross applies to searches conducted prior to its announcement, e.g., State v. Guerra, 93 N.J. 146, 151 (1983); State v. Esteves, ___ N.J. ____ (July 11, 1983), the appellant submits that Ross should not be applied retroactively; the search in the present case should be governed by the guidelines set up in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2022 (1981). This Court, in Belton, held that, "When a policeman has made a lawful custodial arrest of the

occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that vehicle." Id. at 460. This Court further held that a policeman may also examine the contents of any containers within the passenger compartment. Id. However, this Court limited the search of containers to those located in the passenger compartment. "Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk." Id. at 460-61, footnote 4.

Although the automobile owned by Mr. Perella in the present case was a hatchback, Judge Gottlieb found that the cavity formed by folding the rear seat of the vehicle forward amounted as a matter of law to a "trunk". This Court, in the Belton decision, specifically stated that

their holding did not encompass the trunk. After the arrest, Trooper Samulis was entitled to search the interior of the passenger compartment and any containers found therein; he was not authorized to open the "trunk" without a warrant, which he did. The seizure of the briefcase from the "trunk" was therefore unconstitutional. It is well established that the fruits of an unconstitutional search and seizure must be suppressed at any later criminal proceeding. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Therefore, although a search warrant had been obtained, the items found in the locked briefcase should have been suppressed.

CONCLUSION

The questions presented by this appeal are substantial and require plenary consideration by the Court for their resolution.

Respectfully submitted,

JUDD J. CARHART, Esquire
Carhart, Bonistalli & McCarthy
One Milk Street
Boston, Massachusetts 02109
(617) 423-0630

June 22, 1984

CERTIFICATE OF SERVICE

I, Judd J. Carhart, hereby certify that I have served three true and correct copies of the foregoing Jurisdictional Statement by mailing said copies this date, postage prepaid, to the following counsel of record:

Attorney General of New Jersey
25 Market Street, CN 086
Trenton, NJ 08625

_____
Judd J. Carhart, Esquire

June 22, 1984

STEPHEN G. RAYMOND
BURLINGTON COUNTY PROSECUTOR
COUNTY OFFICE BUILDING
RANCOCAS ROAD
MOUNT HOLLY, NEW JERSEY 08060
(609) 267-3000, Ext. 5632

STATE OF NEW JERSEY,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff,	:	BURLINGTON COUNTY LAW DIVISION
- v -	:	(Criminal Action)
VICTOR A. PERELLA,	:	Indictment No. I-246-82
Defendant.	:	

This matter having been opened to the court by John L. Call, Jr., attorney for defendant, with Beth A. Wright, Assistant Prosecutor of Burlington County, appearing on behalf of the State in opposition thereto;

And the court having considered the briefs submitted, testimony and the argument of counsel;

IT IS on this 26th day of August, 1982 ORDERED that defendant's motion to

suppress the evidence seized in this matter on January 28, 1982 be, and the same is hereby denied.

/s/
HON. MYRON H. GOTTLIEB,
J.J.D.R.C., t/

NEW JERSEY SUPERIOR COURT
Burlington County
LAW DIVISION - CRIMINAL
S.B.I. No. 045318B
DATE OF ARREST 1/28/82

THE STATE OF NEW JERSEY

v.
Victor A. Perella
Defendant

JUDGMENT OF CONVICTION

The defendant on April 2, 1982 was indicted on Indictment #I-246-82. The defendant on May 6, 1982 entered a plea of not guilty to the indictment for the crime(s) of: (Please include Title, Statute and Degree)
First Court - UNLAW POSS. WPN 2:39-5(B);
Second Count-POSS CDS COCAINE 24:21-20(A)
and the defendant having on December 17, 1982 RETRACTED PLEA OF NOT GUILTY AND ENTERED A PLEA OF GUILTY TO:
First Count - UNLAW POSS. WPN 2:39-5(B) (third degree). It is, therefore, on

January 21, 1983 Ordered and Adjudged that the defendant be and is sentenced Fine $100.00. Cost $25.00. VCCB $25.00. Dismissal of count 2 and $354360. A penalty of $25 is imposed on each count on which the defendant was convicted unless the box below indicates a higher penalty pursuant to N.J.S.A. 2CL43-3.1.

/ X / penalty imposed on count(s) 1 is $25.00 respectively.

Total Fine $100.00, Total Restitution ___, Total VCCB Penalty $25.00. Installment payments, if applicable, are due at the rate of $_____ per ____.

STATEMENT OF REASONS REQUIRED BY R.3:21-4(e) APPEARS ON THE REVERSE SIDE

A.O.C., Form No. LR-34 1/78 Rev. 2/81

cc: Chief Probation Officers
AOC Sentencing Research Project

ATTORNEY FOR DEFENDANT
Upon entry of Guilty Plea or Conviction
John L. Call, Jr., Esquire

At time of Sentencing
John L. Call, Jr., Esquire

Wanda Phillips, Court Clerk
Edward A. Kelly, Jr., County Clerk
January 24, 1983

Defendant to receive R. 3:21-8 credit
for time spent in custody
From _____ to _____
Days credit _____

STATEMENT OF REASONS, R. 3:21-4(e)

Aggravating Circumstances:

#_ The need for deterring the defendant and others from violating the law.

Mitigating Circumstances:

#7 The defendant has no history or prior delinquent or criminal activity or has led a law-abiding life for a substantial period of time before commission of the present offense.

#9 The character and attitudes of the defendant indicate that he is unlikely to commit another offense.

_____

Judge
Paul R. Kramer, J.S.C

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3016-82T4

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

VICTOR A. PERELLA,
Defendant-Appellant.

Submitted January 19, 1984.
Decided Feb. 7, 1984

Before Judges J.H. Coleman and Bachman, J.S.C., t/a

On appeal from Superior Court of New Jersey, Law Division, Burlington County.

John L. Call, Jr., attorney for appellant.

Irwin I. Kimmelman, Attorney General of New Jersey, attorney (Arthur S. Safir, Deputy Attorney General, of counsel, and on the brief.)

PER CURIAM

After denial of motions to suppress evidence pursuant to R. 3:5-7 and to

dismiss the charge of possessing a handgun without a permit, defendant pled guilty to possessing the gun in violation of N.J.S.A. 2C:39-5b. He was sentenced to pay a fine of $100 plus $25 costs. Defendant now appeals contending:

1. THE COURT BELOW ERRED IN NOT DISMISSING COUNT ONE OF BURLINGTON COUNTY INDICTMENT NO. I-246-82 IN ACCORDANCE WITH N.J.S.A. 2C:2-11 (DE MINIMIS INFRACTIONS).

2. THE WARRANTLESS SEARCH OF THE "TRUNK" OF THE VEHICLE OF THE DEFENDANT WAS VIOLATIVE OF THE SEARCH DOCTRINE ANNOUNCED IN NEW YORK v. BELTON, 453, U.S. 454, 101 S.CT. 2860 (JULY 1, 1981).

3. THE "UNTAXED CIGARETTES" WHICH GAVE RISE TO THE ARREST OF THE DEFENDANTS WERE ILLEGALLY SEIZED AND DID NOT FALL WITHIN THE "PLAIN VIEW" EXCEPTION FOR A WARRANTLESS SEARCH.

On January 28, 1982, defendant was a passenger in a 1979 Datsun hatchback that was operated by Robert Bronzetti on the

New Jersey Turnpike. Trooper Samulis stopped the vehicle for swerving and weaving in the right lane. While standing beside the driver's door waiting for the driver's credentials, the trooper observed what appeared to be untaxed cigarettes in plain view. The trooper asked the driver if he was transporting untaxed cigarettes and he said yes. The trooper then seized the bag containing three cartons of cigarettes that were purchased in Florida. Defendant, the owner of the vehicle, and the driver were arrested for transporting untaxed cigarettes.

Trooper Samulis then searched the interior of the vehicle. He found a vial in the console which he suspected contained cocaine. He found a gun holster in a piece of luggage found inside the vehicle. A locked briefcase was found

behind the driver's seat. A search warrant was obtained to search the briefcase. A nine millimeter automatic pistol, a plastic bag of suspected marijuana, a vial and a plastic funnel containing a white powder residue were seized from the briefcase.

We have carefully studied the record in light of the contentions raised in this appeal. We are satisfied that the factual determinations and legal conclusions made by the trial judge when deciding the suppression motion are soundly grounded in the record. We find no warrant to disturb them. State v. Johnson, 42 N.J. 146, 161-162 (1964). Hence, probable cause existed to arrest defendant for possession of untaxed cigarettes based upon the admission of the operator and the observations of the trooper. Once

arrested, New York v. Belton, 453 U.S. 454 (1981) authorized a search of the interior of the vehicle, even the luggage, for other evidence of untaxed cigarettes. In the present case, the search of the interior of the vehicle incident to a lawful arrest revealed the vial of suspected cocaine and a gun holster. Those facts, when added to the presence of untaxed cigarettes, established probable cause to search the entire automobile including the imaginary trunk where the briefcase was located. United States v. Ross, 456 U.S., 798, 825 (1982). See also State v. Guerra, 93 N.J. 146, 151 (1983) and State v. Esteves, 93 N.J. 498, 508 n.3 (1983) (applying Ross retroactively). State v. Alston, 88 N.J. 211 (1981). Here, however, a warrant was obtained before the briefcase was opened.

Substantial deference should be accorded the judge's finding of probable cause to search the briefcase. State v. Kassbucki, 52 N.J. 110, 117 (1968). Accordingly, the order denying the motion to suppress is affirmed.

Finally, defendant contends that the indictment should have been dismissed as a "de minimis infraction within the meaning of N.J.S.A. 2C:2-11." We have no doubt that the assignment judge correctly denied this motion. A review of the legislative history and intent which underlie the passage of N.J.S.A. 2C:39-5b. makes it clear that no distinction was intended for persons licensed to carry guns in other states. Hence, we find the contention is clearly without merit.

The judgment of conviction is affirmed.

SUPREME COURT OF NEW JERSEY
C-614 SEPTEMBER TERM 1983
22,318

STATE OF NEW JERSEY, Plaintiff-Respondent,	:	
vs.	:	ON PETITION
VICTOR A. PERELLA, Defendant-Petitioner	:	FOR CERTI- FICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3016-82T4 having been submitted to this Court, and the Court having considered the same:

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 27th day of March, 1984.

/s/ Stephen W. Townsend
Clerk

IN THE SUPREME COURT OF
THE STATE OF NEW JERSEY

VICTOR PERELLA, Appellant,	)	
v.	)	No.
STATE OF NEW JERSEY, Appellee,	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Victor Perella, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the New Jersey Supreme Court (affirming the judgment of conviction), entered herein on March 27, 1984.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted,

VICTOR PERELLA
By his Attorney,

JUDD J. CARHART, Esquire
Carhart, Bonistalli & McCarthy
One Milk Street
Boston, Massachusetts 02109
(617) 423-0630

June 14, 1984

CERTIFICATE OF SERVICE

I, Judd J. Carhart, hereby certify that I have served a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States by mailing said copy this date, postage prepaid, to the following counsel of record:

Attorney General of New Jersey
25 Market Street, CN 086
Trenton, New Jersey 08625

Steven W. Townsend
Richard J. Hughes Justice Complex
CN 970
Trenton, New Jersey 08625

Clerk of Superior Court
of New Jersey
P.O. Box CN 006
Trenton, New Jersey 08625
Attn: Donald Wollert

Judd J. Carhart, Esquire

June 15, 1984

THE COMMONWEALTH OF MASSACHUSETTS

LICENSE TO CARRY FIREARMS

(Not A Pass) License No. D-194772

This license is issued in accordance with the provisions of Section 131, Chapter 140, of the General Laws of Massachusetts.

Victor Arthur Perella (DOB) 12/23/43

(Residence or Business) 11 Upland Road
Natick, MA 01760

(Date of Issue) 3/24/78

(Expiration Date) 12/23/82

/s/ Applicant /s/ Licensing Authority

(Residence) 11 Upland Road
Natick, MA 01760

(Place of Birth) Somerville, MA

(Complexion) Med.

(Height) 5' 10" (Weight) 170

(Occupation) Self-employed

(Color Hair) Brown (Color Eyes) Hazel

(Reason for Issuing License) Protection;
life, property

ISSUED FOR USE OF HOLDER NAMED
HEREON. USE OR POSSESSION EXCEPT
AS PRESCRIBED BY LAW IS UNLAWFUL
(Section 131E. Chapter 140 G.L.)

REVOKED 4/5/82